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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. [redacted] 61

RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL,

Petitioners,

vs.

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

J. R. GOLDTHWAITE, JR.
1431 Candler Building
Atlanta, Georgia 30303

PIERRE PELHAM
First National Bank Bldg. Annex
Mobile, Alabama

Counsel for Petitioners

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	9
1. The Decision Below is Inconsistent With Decisions of this Court and is Therefore Incorrect	9
2. The Decision Below is Inconsistent With Decisions of the Courts of Other States	11
3. The Suit is of Major Importance "To Secure the National Rights and Uniformity of Judgments."	13
Conclusion	18

INDEX TO APPENDICES

Appendix A	1a
Part A—Constitutional Provisions Involved	1a
Part B—Statutes Involved	2a
Appendix B	7a
Part A—Excerpts from Plea to the Jurisdiction	7a
Part B—Excerpts from Amendment to Plea to the Jurisdiction	10a
Part C—Motion for Rehearing and Memorandum in Support Thereof	11a
Appendix C	14a
Part A—Opinion of the Trial Court	14a
Part B—Opinion of the Trial Court	15a
Part C—Opinion of the Supreme Court of Alabama	16a
Part D—Judgment	24a
Part E—Order Denying Motion for Rehearing	25a

TABLE OF AUTHORITIES CITED

United States Supreme Court Cases

	Page
Amalgamated Association of Street Employees v. *Wisconsin Board*, 340 U.S. 383	9
Construction & General Workers Union v. *Curry*, 371 U.S. 544	2, 8, 11, 12, 13, 15
International Brotherhood of Electrical Workers v. *Farnsworth & Chambers Co.*, 353 U.S. 969	2, 11
Joliet Contractors Association v. *NLRB*, 193 F 2d 833 (CA-5, 1952)	10
Kinard Construction Co. v. *Building Trades Council*, 346 U.S. 933	12
Marine Engineers Beneficial Association v. *Interlake Steamship Co.*, 370 U.S. 173	13
Morton v. *Teamsters' Union*, 320 F 2d 505 (CA-6, 1963, cert. granted Dec. 9, 1963)	17
NLRB v. *United Construction Workers*, 198 F 2d 391 (CA-4, 1952), cert. den., 344 U.S. 876	10
Plumbers Local Union v. *Borden*, 373 U.S. 690	18
Retail Clerks International Association v. *Schermerhorn*, ... U.S. ....., 54 LRRM 2612 (Dec. 2, 1963)	11, 13
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236	2, 11, 12
United Automobile Workers v. *Russell*, 356 U.S. 634	12, 15
Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468	2, 11, 12

Other Cases

	Page
Alabama Highway Express Inc. v. *Teamsters' Local Union 612*, 268 Ala. 392, 108 So. 2d 350	5, 12, 13, 15
Carpenters' Union v. *Briggs Construction Co.*, 218 Ga. 742, 130 S. E. 2d 707 (Ga. Sup. Ct., 1963)	12
Caton v. *Pic-Walsh Freight Co.*, ... Tenn. ....., 364 S. W. 2d 931 (Tenn. Sup. Ct., 1963)	12

Douglas Aircraft v. *International Brotherhood of Electrical workers*, ... N.C. ....., 101 S. E. 2d 800 (N.C. Sup. Ct., 1958) 12
Hattiesburg Building and Trades Council v. *Broome*, ... Miss. .....; 153 So. 2d 695 (Miss. Sup. Ct., 1963), 53 LRRM 2257 12
Oil & Chemical Workers v. *Shell Oil Co.*, ... La. ....., 150 So. 2d 102 (La. Ct. App., 1963), 52 LRRM 2406 12
Scherer & Sons, Inc. v. *ILGWU Local 415*, ... Fla. ....., 142 So. 2d 290 (Fla. Sup. Ct., 1962) 12
Taylor v. *Bean*, ... Ark. ....., 355 S. W. 2d 602 (Ark. Sup. Ct., 1962), 49 LRRM 3056 12
Twedell, Ex parte, ... Tex. ....., 309 S. W. 2d 834 (Tex. Sup. Ct., 1958) 12

NATIONAL LABOR RELATIONS BOARD CASES

PAGE
Clyde Taylor Company, 127 NLRB 103 17
Corfu Mfg. Co., 3-RC-2523 (June 28, 1961), 48 LRRM 1584 10
Jamestown Builders Exchange, Inc., 93 NLRB 386 10
Jemison & Conwell d/b/a Jemcon Broadcasting Co., AO-29, 135 NLRB 362 14
Madison Building and Construction Trades Council, 134 NLRB 517 10
McAllister Transfer, Inc., 110 NLRB 1769 10
Perfect TV, Inc., 134 NLRB 575 10
P-M Garages, Inc., 139 NLRB 987 10
Raritan Valley Broadcasting Co., Inc., 122 NLRB 90 ..... 5, 9, 10
The Family Laundry, Inc., 121 NLRB 1619 10
Washwell No. 2, Inc., 139 NLRB 417 10

CONSTITUTIONAL PROVISIONS

Constitution of the United States;
Article I, Sec. 8, Clauses 3 and 18 (Commerce Powers) 2, 5
Article VI, Clause 2 (Federal Supremacy) 2, 5

Statutes

	Page
Labor Management Relations Act, 1947; (June 23, 1947, Ch. 120, Sec. 1):	
61 Stat. 136, 29 USC 141	3
Labor Management Reporting & Disclosure Act, 1959; (Sep. 14, 1959, P. L. 86-257, Title VII, Sec. 701);	
73 Stat. 541, 29 USC 153, 158, 159, 160, 164 & 187	3
National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and by the Labor Management Reporting & Disclosure Act, 1959; (June 23, 1947, Ch. 120, Title I, Sec. 101);	
61 Stat. 136, 73 Stat. 541, 29 USC 151	3
61 Stat. 140, 29 USC 157 [NLRA, § 7]	3
61 Stat. 141, 73 Stat. 542, 29 USC 158(b) & (c) [NLRA, § 8 (b) & (c)]	3
61 Stat. 146, 73 Stat. 544, 29 USC 160(a), (c), (k) & (l) [NLRA, Sec. 10(a), (c), (k) & (l)]	3
73 Stat. 541, 29 USC 164(c) [NLRA, § 14(c)]	3, 9

Miscellaneous

Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi	13
Rules and Regulations of National Labor Relations Board, Series 8, as Amended, Subpart H, § 102.98, 24 Federal Register 9095 (Nov. 7, 1959, as Amended by 26 F. R. 3885, May 4, 1961, 26 F. R. 7546, Aug. 15, 1961, 27 F. R. 2091, Mar. 3, 1962 and 27 F. R. 5094, Jun. 1, 1962	14
Twenty-Fifth Annual Report of the National Labor Relations Board, 1960, pp. 18-20	10
Twenty-Third Annual Report of the National Labor Relations Board, 1958, pp. 7-9	10

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Petitioners,

VS.

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Radio and Television Broadcast Technicians Local Union 1264, et al., pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above entitled case on December 12, 1963, as to which a motion for re-hearing was denied by that Court by entry dated January 16, 1964.[1]

CITATIONS TO OPINIONS BELOW

Two opinions of the trial court (R. 83 & 384) are unreported and are printed in Appendix C, *infra,* pp. 14a and 15a. The opinion of the Supreme Court of Alabama (R. 414), printed in Appendix C, *infra,* p. 16a, is reported at — Ala. —, 159 So. 2d 452.

[1] The petitioning labor organization is an unincorporated voluntary association. Also petitioners herein are William Rabon, David Fridge and H. D. Smith, members of such association, who were defendants in the trial court and appellees in the Supreme Court of Alabama.

JURISDICTION

The opinion (R. 414) and judgment (R. 427) of the Supreme Court of Alabama were entered on December 12, 1963. Timely application for rehearing filed on December 20, 1963 (R. 428) was denied on January 16, 1964. (R. 433) The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3). [Since rights, privileges and immunities were set up and claimed under the Constitution and statutes of the United States and are believed to have been improperly denied by the highest court of the State of Alabama.]

QUESTIONS PRESENTED

I.

Whether the State of Alabama has jurisdiction through it courts to enjoin concerted activity of employees in the course of a dispute with an employer which affects interstate commerce where it is arguable that the National Labor Relations Board, under rules of decision previously issued by it, would assert its jurisdiction under the National Labor Relations Act, as amended.

II.

Did the Supreme Court of Alabama, in reversing the decision of the trial court that it was without jurisdiction because of Federal pre-emption, act in derogation of the holdings of this Court in *Construction and General Workers' Union* v. *Curry*, 371 U. S. 544; *International Brotherhood of Electrical Workers* v. *Farnsworth and Chambers Co.*, 353 U. S. 969; *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; and other cases.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Article I, Section 8, Clauses 3 and 18 (Commerce Powers)

Article VI Clause 2 (Federal Supremacy)

Labor Management Relations Act, 1947:
(June 23, 1947, Ch. 120, § 1, *et seq.;* 61 Stat 136, *et seq.;* 29 USC 141, *et seq.*)

Labor Management Reporting and Disclosure Act, 1959:
(September 14, 1959, P. L. 86-257, Title VII, § 701, *et seq.;* 73 Stat. 541, *et seq.;* 29 USC 153, 158, 159, 160, 164 and 187)

National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and by the Labor Management Reporting and Disclosure Act, 1959:
(June 23, 1947, Ch. 120, Title I, § 101, *et seq.;* 61 Stat. 136, *et seq.;* 73 Stat. 541, *et seq.;* 29 USC 151, *et seq.*)

61 Stat. 140, 29 USC 157 [NLRA, Sec. 7]

61 Stat. 141, 73 Stat. 542, 29 USC 158 (b) & (c), [NLRA, Sec. 8 (b) & (c)]

61 Stat. 146, 73 Stat. 544, 29 USC 160 (a), (c), (k) & (l) [NLRA, Sec. 10 (a), (c), (k) & (l)]

73 Stat. 541, 29 USC 164 (c) [NLRA, Sec. 14 (c)]

Texts are set out in Appendix A, pp. 1a to 6a. *infra.*

STATEMENT OF THE CASE

The petitioning union and Radio Station WAIP in Mobile, Alabama, were parties to a collective bargaining agreement covering the conditions of employment of petitioner David Fridge, a full-time radio technician, and another employee who was a part-time technician. (R. 172, 175, 207, 220, 222) Station WAIP was sold to respondent and the radio technicians were displaced. (R. 168, 169) Respondent operated the station under the call letters WSIM (R. 2) After conversations concerning the employment of Fridge and the adherence to standards established by collective bargaining with other radio stations, (R. 220, *et seq.*, 225 *et seq.*, 252, *et seq.*, 255, *et seq.*, 260, *et seq.*) the petitioning union commenced peaceful picketing at the premises of Radio Station WSIM (R. 264) and began soliciting advertisers to patronize stations having union contracts rather than to patronize respondent. (R. 3, 265,

266) The solicitations were made by letter and personal contact. (R. 266, 267)

On August 31, 1962, respondent filed a complaint in the Circuit Court of Mobile County asking that the picketing and solicitation of advertisers be enjoined until an election for the selection of a collective bargaining representative could be held in accordance with Federal law. (R. 1) The union filed a plea to the jurisdiction on September 10, 1962, asserting Federal preemption. (R. 7) On the same date, respondent filed an amended complaint, which substituted for the original, alleging that the picketing and solicitation of advertisers constituted a boycott, illegal under Alabama law, and was a violation of the State's right-to-work law. (R. 27)

On September 12, 1962, petitioners amended the plea to the jurisdiction.[2] The plea, as amended, alleged that respondent is one of a group or chain of four radio stations, known as the Holt Broadcasting Service, the headquarters of which are located in Hattiesburg, Mississippi, and that the other stations comprising the Holt Broadcasting Service are located in Montgomery, Alabama, Hattiesburg, Mississippi, and McComb, Mississippi. The plea averred that the four radio stations are commonly owned and controlled, with Charles W. Holt owning a majority interest in all four stations and being the executive head of all four stations; that a common personnel and labor relations policy prevails at all four stations; that respondent is part of the integrated financial operation known as the Holt Broadcasting Service; that the volume of business done by the four radio stations greatly exceed $100,000 per year; that the activities of petitioners constitute protected concerted activity within the meaning of the National Labor Relations Act, as amended; that the National Labor Relations Board would assert jurisdiction over the operations of respondents as a part of a business substantially affecting

[2] R. 81. Excerpts from the plea to the jurisdiction showing that the claim of Federal right was properly and timely filed, are printed in Appendix B, pp. 7a to 10a.

interstate commerce (R. 81); that the State court was without jurisdiction because the jurisdiction of the National Labor Relations Board over the labor dispute was exclusive (R. 10); and that for the court to grant injunctive relief would be unconstitutional and in derogation of the authority granted to the United States Congress by Article I, Section 8, Paragraph 3 of the Constitution of the United States to regulate interstate commerce and of Article VI, Clause 2, of the Constitution of the United States providing for the supremacy of the Federal Constitution and the laws enacted pursuant thereto. (R. 10)

Following a preliminary hearing the Court issued an interlocutory decree on September 3, 1962, finding the conduct of the petitioners to be violative of Alabama law and enjoining further activity by petitioners. (R. 83; App. C., p. 14a)

The case came on for final hearing, following which the trial court found that its jurisdiction was pre-empted by the National Labor Relations Act. A motion to dissolve the injunction was granted and the case was dismissed on May 23, 1963. (R. 384, App. C., p. 15a)

Respondent requested reinstatement of the injunction pending appeal which request was granted on May 30, 1963, notwithstanding the earlier ruling of the trial court that it was without jurisdiction. (R. 387, 388)

Respondent appealed and on December 12, 1964, the Supreme Court of Alabama, relying upon its previous decision in *Alabama Highway Express, Inc.* v. *Teamsters' Local Union 612*, 268 Ala. 392, 108 So. 2d 350, held (R. 414; App. C., p. 16a) that the state court had the prerogative of determining its own jurisdiction irrespective of the holdings of the National Labor Relations Board and that it chose to base its determination of jurisdiction upon the Board's decision establishing a volume of business of $100,000 per annum for a single radio station (*Raritan Valley Broadcasting Co., Inc.*, 122 NLRB 90) rather than upon the decisions of the Board applicable to commonly

owned and controlled financial chains.[3] The Court held that since petitioners had not pleaded and relied upon the $100,000 jurisdictional standard established by the Board for single radio stations, it considered the plea to the jurisdiction insufficient; and it refused to consider the decisions of the Board applicable to chain operations and reversed the jurisdictional determination of the trial court.

By motion for rehearing petitioners again pointed out that they relied upon specific decisions of the Board applicable to commonly owned and controlled financial enterprises, rather than upon the Board's jurisdictional standard applicable to single radio stations and requested reconsideration of its former judgment. (R. 428; App. B, p. 11a) The motion for rehearing was denied on January 16, 1964. (R. 433; App. C, p. 25a)

The evidence shows that Charles Holt is the majority owner of the four corporations operating radio stations and the sole owner of a service corporation which performs accounting, billing and other managerial services for the four radio corporations. Holt's wife is a minority stockholder in all four radio corporations. Bob Robinson is a minority stockholder in three of the radio corporations, Montgomery, Hattiesburg and Mobile. Mrs. Holt is Secretary of three of the radio corporations and Vice-President of the fourth and also of the service corporation. Robinson is President and Manager of the Montomery, Alabama radio corporation and Vice-President of the Hattiesburg, Mississippi and Mobile, Alabama radio corporations and of the service corporation. Stan Lightsey is Treasurer of all five corporations and Manager of the service corporation. (R. 323-326, 338, 347)

The service corporation shares office space with radio station WHSY in Hattiesburg, Mississippi in a building owned by WHSY, one of the chain. (R. 337) Holt and Lightsey have their offices in that building. (R. 115) Daily

[3] Twenty such Board decisions were cited to the Alabama Court, both in petitioners' original brief and in their motion for rehearing. (R. 430; App. B., p. 12a)

financial reports are forwarded by each station manager to Hattiesburg, Mississippi addressed to Lightsey at Station WHSY. (R. 116, 332) A copy is sent to Robinson in Montgomery. (R. 332)

Lightsey handles all bookkeeping, billing of advertisers and the payrolls for the four radio corporations from the central finance office. He supervises the credit policies and participates in detail in the collection of accounts of all four radio stations. (R. 125, 328) Day-to-day purchases of supplies are reported to Lightsey and paid for by him. (R. 327) Each station has a separate bank account, checks on which are written by Lightsey (R. 326) and signed by Holt alone or by Robinson and Lightsey. (R. 126, 127) Lightsey participates in the major financial transactions of the four radio corporations and he made the property appraisal of Station WAIP when it was purchased by the financial enterprise. (R. 170, 171) Radio equipment is transferred back and forth between the four corporations. (R. 183, 184)

Only two of the stations, Montgomery and Mobile, have a national advertising agent. This agent was employed by Holt and Robinson. (R. 160, 339) Holt and Robinson employ the managers and the engineering personnel of the radio stations. (R. 338, 114, 132, 220, 221, 223) They have also employed other personnel for the various stations and employees are inter-changed between stations from time to time. (R. 103, 113, 129, 297) While station managers have authority to hire and fire station personnel, such acts are discussed with Holt or Robinson (R. 130, 131); and station managers do not have the authority to make decisions as to matters of recognition of labor unions, collective bargaining or other labor relations policies. (R. 155, 156, 225, 226, 227) Robinson or Holt make the decisions on these policy matters (R. 112, 119, 226); and Holt, Robinson and Lightsey personally participated in discussions with Local 1264. (R. 220, 225, 226) Respondent's Mobile station manager repeatedly asserted that he had no authority to discuss labor relations policy with the union representatives. (R. 112, 220)

Holt requires radio stations to announce that they are members of the Holt Broadcasting Service (R. 105, 122) and employees of respondent refer to the financial enterprise as "the Holt group" or "the Holt enterprises." (R. 114, 198) Holt personally visits each station regularly and frequently (R. 298, 300), and supervises the sales policies of each station and the sales efforts of each salesman. He also gives supervisory advice and suggestions as to the conduct of their daily work. (R. 105, 106, 122, 301) Robinson advised representatives of Local 1264 that the Holt stations were thinking of employing an engineer (radio technician) who would be resident chief engineer in Mobile, and would be consulting engineer for the other stations. (R. 114, 223)

The manager of the Mobile station is in almost daily contact with Mr. Robinson concerning the everyday operations of the station. (R. 305) Management of the Hattiesburg, Montgomery, and Mobile stations is particularly integrated in Holt, Robinson and Lightsey. The Montgomery station has annual advertising sales of approximately $200,000 in volume, while Hattiesburg and McComb have annual advertising sales of approximately $100,000 each. Advertising sales at Mobile, were being sold at a rate which, when projected for a twelve month period, would approximate a total between $50,000 and $60,000. (R. 341)

Final trial of the case, at which all available evidence relative to the jurisdictional issue was introduced, resulted in dismissal by the trial court, and the only act remaining to be performed by the trial judge, following reversal and remand by the Supreme Court of Alabama, is the assessment of damages on the record already made. The decision of the Alabama Supreme Court is final as to all Federal questions and review by this Court upon this application will be dispositive of all Federal issues in the case.[4]

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[4] Under these circumstances this Court will assert jurisdiction. *Construction & General Laborers' Local Union* v. *Curry*, 371 U. S. 544.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is Inconsistent With Decisions of This Court and Is Therefore Incorrect.

All radio stations affect interstate commerce because such are authorized and operated pursuant to Federal statutes enacted by Congress under its power to regulate interstate commerce power. The Natonal Labor Relations Board therefore has statutory jurisdiction under the National Labor Relations Act, as amended, to regulate the labor relations of all radio stations in accordance with the labor relations policies which Congress thought necessary and proper in industries affecting commerce. *Amalgamated Association of Street Employees* v. *Wisconsin Board,* 340 U. S. 383. Where the labor relations of such stations are concerned, the only jurisdictional question is whether the Board would assert jurisdiction under the discretionary policies defined by it; and unless the Board had by a rule of decision declined to assert jurisdiction over a labor dispute involving a similar class or category of employers because, "in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction," the State of Alabama erred in asserting jurisdiction over this labor dispute. *National Labor Relations Act,* Sec. 14(c)(1) and (2); 29 USC 164(c)(1) and (2).[5]

In *Raritan Valley Broadcasting Co., Inc.,* 122 NLRB 90, the Board held that it would not assert jurisdiction over labor relations and labor dsputes at single radio stations having an annual sales volume of less than $100,000. Similar discretionary jurisdictional rules based upon volume of annual sales have been issued by the Board covering many industries, some of which are based on the flow of goods in commerce and others of which, as in the case of radio stations, are based upon gross sales with a requirement that

[5] The Board has not undertaken to publish rules, adopted pursuant to the Administrative Procedure Act, for the guidance of parties as to the discretionary exercise of its jurisdiction.

statutory jurisdiction also be shown. *Twenty-Third Annual Report of the National Labor Relations Board*, 1958, pp. 7-9. See also *Twenty-Fifth Annual Report of the National Labor Relations Board*, 1960, pp. 18-20.

As respects all industries, the Board has repeatedly held that, where statutory jurisdiction is shown, its discretionary exercise of jurisdiction will be based upon the totality of the impact upon interstate commerce of an entire financial enterprise rather than upon the impact of a single segment of the enterprise standing alone. In such cases involving separate corporations which are a part of a commonly owned and controlled chain having centralized control of labor relations policies vested in common ownership, officers, and management, the Board holds that it will be governed in the exercise of its discretionary jurisdiction by the impact upon commerce of the entire enterprise; and it will assert jurisdiction over a corporate segment of the enterprise if the entire enterprise meets the standard established for the industry ($100,000 for radio and television, *Raritan, supra*) even though that segment alone would not satisfy the discretionary jurisdictional criteria.[6] Eg., *Perfect T. V., Inc.*, 134 NLRB 575; *The Family Laundry, Inc.*, 121 NLRB 1619; *Washwell No. 2, Inc.*, 139 NLRB 417; *P-M Garages, Inc.*, 139 NLRB 987; *Corfu Mfg. Co.*, 3-RC-2523 (June 28, 1961), 48 LRRM 1584.

Centralized control of the labor relations policies and the financial policies of the four radio stations, self-designated

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[6] The Board has also held that for the purposes of the discretionary determination it will consider the impact on interstate commerce of all businesses secondarily affected by a labor dispute rather than the impact of the primary employer disputant only. *National Labor Relations Board* v. *United Construction Workers*, 198 F 2d 391 (CA-4, 1952), cert. den., 344 U. S. 876; *Joliet Contractors Association v. NLRB*, 193 F 2d 833, (C-5, 195); *Madison Building and Construction Trade Council*, 134 NLR 3 517; *McAllister Transfer, Inc.*, 110 NLRB 1769; *Jamestown Builders Exchange, Inc.*, 93 NLRB 386. A foundation was laid in the record for the application of this jurisdictional rule but it is not deemed necessary to burden the Court by setting forth the detailed facts in this petion.

by the controlling owner as the "Holt Broadcasting Service," was shown to be tightly retained and exercised by Holt, the majority stockholder, and by Robinson, the minority stockholder, and Lightsey, were the officers of the corporations. It is therefore not only "arguable," but clearly apparent that the Board would assert its discretionary jurisdiction over the labor relations of respondent under the Board rules of decision cited, *supra*.

In such cases the State court must yield to the "primary competence" of the Board. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236. Where this is shown, the State courts are without jurisdiction to enjoin concerted activity even though the State court might deem the objectives sought to be attained by such activity to be violative of the State's right-to-work law or other statutes. *Construction and General Laborers' Local Union* v. *S. J. Curry*, 371 U. S. 544; *IBEW Local Union* v. *Farnsworth and Chambers Co.*, 353 U. S. 969; *Weber* v. *Anheuser-Busch*, 349 U. S. 468; *Retail Clerks Int. Assn.* v. *Schermerhorn*, — U. S. —, 54 LRRM 2612 (second decision, Dec. 2, 1963).

II.

The Decision Below Is Inconsistent With Decisions of the Courts of Other States.

Past actions of the highest courts of various states, particularly in the South, have made it apparent that provincialism in legal thought creates a barrie to the acceptance of the will of the national majority as expressed in Federal labor relations policy. It has been necessary, almost without exception, for this Court to grant certiorari to review decisions of the highest courts of the various Southern States where Federal preemption of labor relations affecting commerce was urged, before those courts have been willing to acknowledge the preemptive dignity of Federal authority in the field. With almost equal consistency, having once been reversed, those courts now acknowledge Federal supremacy in this area.

By and large the Southern States by decisions of their appellate courts have come to recognize the authoritative implications of this Court's decisions in *Weber*, the second *Garmon* case, the *Curry* decision and other similar holdings. E.g., *Oil & Chemical Workers* v. *Shell Oil Co.*, — La. —, 150 So. 2d 102 (La. Ct. App., 1963), 52 LRRM 2406; *Caton* v. *Pic-Walsh Freight Co.*, — Tenn. —, 364 S. W. 2d 931 (Tenn. Sup. Ct., 1963); *Scherer & Sons, Inc.* v. *ILGWU Local 415*, — Fla. —, 142 So. 2d 290 (Fla. Sup. Ct., 1962); *Taylor* v. *Bean*, — Ark. —, 355 S. W. 2d 602 (Ark. Sup. Ct., 1962); *Carpenters' Union* v. *Briggs Constr. Co.*, 218 Ga. 742, 130 S. E. 2d 707 (Ga. Sup. Ct., 1963); *Douglas Aircraft* v. *Int. Bro. of Electrical Workers*, 247 N. C. 620, 101 S. E. 2d 800 (N. C. Sup. Ct., 1958); *Ex parte Twedell*, — Tex. —, 309 S. W. 2d 834 (Texas Sup. Ct., 1958). A few states, however, particularly Alabama and Mississippi, have evidenced notable reluctance to acknowledge Federal preemption in labor relations. The present holdings of their courts are expressed by the instant case and the case of *Alabama Highway Express, Inc.* v. *Teamsters' Local 612*, 268 Ala. 392, 108 So. 2d 350, in Alabama, and by the case of *Hattiesburg Bldg. & Trades Council* v. *Broome*, — Miss. —, 153 So. 2d 695 (Miss. Sup. Ct., 1963), in Mississippi. The reversal by this Court of the holding of the Alabama Supreme Court in *Kinard Construction Co.* v. *Building Trades Council*, 346 U. S. 933, did not lay the issue at rest in Alabama because the complaint in the *Kinard* case alleged violations of Federal law as well as state law and, probably also, because that reversal was offset to some measure by the affirmance of the Alabama Court in *United Automobile Workers* v. *Russell*, 356 U. S. 634.

The *Alabama Highway Express* decision, cited *supra*, holds that the State court has authority, in determining the extent of its own jurisdiction, to decide whether "employees" are "independent contractors" or not, irrespective of the fact that the National Labor Relations Board is granted that prerogative by Section 2(3) of the Act (29 USC 152(3)) where industries affecting commerce are con-

cerned.[7] It also holds that the State's courts have authority to enforce its Right-to-Work Statute by writ of injunction against concerted activity in labor disputes affecting commerce.[8]

Unfortunately this Court did not review the *Alabama Highway Express* ruling; and the present case apparently creates a boundless application of that decision and potentially permits all Alabama trial courts to arrogate to themselves the authority to determine the limits of state jurisdiction *ab initio* without serious regard to the applicability of previous rules of decision issued by the Board.

The decisions of the Alabama court in this case and in *Alabama Highway Express* directly conflict with the foregoing State court decisions which take heed of the admonitions repeatedly issued by this Court in its decisions in the field. e.g., state court cases cited, *supra*.

III.

The Suit Is of Major Importance "To Secure The National Rights and Uniformity of Judgments."

In 1949, former Chief Justice Vinson noted that "the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of Judgments.' "[9] We are not aware of any instance where national rights are in greater need of sustenance by intervention of this Court than in the field of labor relations in Alabama.

This is one of three similar cases in the Circuit Court of Mobile County, Alabama, in which injunctions are outstanding against the petitioning union.

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[7] *Contra, Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.*, 370 U. S. 173.

[8] *Contra, Construction and General Laborers' Local Union* v. *Curry, supra; Retail Clerks* v. *Schermerhorn*, second decision, *supra*.

[9] Address of the Chief Justice before the American Bar Association, September 7, 1949, 69 S. Ct. v., vi.

In the first of these cases[10] two, of three, radio technicians employed by Radio Station WLIQ in Mobile joined the union and the union requested recognition. The station (Jemison and Conwell d/b/a Jemcon Broadcasting Co.) gave notice of discharge to one of the technicians who had joined the union and refused recognition of the union until it had been designated as bargaining agent in an election. A petition for an election filed by the union was dismissed by the Director of the Board's Fifteenth Region because the station, which was not one of a chain, failed to meet the Board's $100,000 jurisdictional criteria for single stations. The remaining union technician went on strike, a peaceful picket line was established, and the union began publicizing the facts of the dispute and requesting advertisers to patronize stations with which it had contracts rather than to patronize Station WLIQ. This occurred in September, *1961.*

Jemison and Conwell procured an *ex parte* injunction against the picketing and solicitation of advertisers and the union applied to the National Labor Relations Board, pursuant to the Rules and Regulations of the Board issued to implement Sections 14(c)(1) & (2) of the Act,[11] for an Advisory Opinion as to whether the Board would assert jurisdiction over the labor dispute. (R. 13) The Board ruled that it *would* assert jurisdiction because of the impact upon interstate commerce of the secondary effects of the dispute. *In re Jemison and Conwell d/b/a Jemcon Broadcasting Co.*, AO-29, 135 NLRB 362; (R. 19).

At the interlocutory hearing, the Circuit Court, relying upon the decision of the Supreme Court of Alabama in

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[10] *Jemison and Conwell d/b/a Jemcon Broadcasting Co.* v. *IBEW Local 1264*, Case No. 56,748-McC in the Circuit Court of Mobile County, Alabama; *Jemcon Broadcasting Co., Inc.* v. *Local 1264*, Case No. 59,468-McC in the same court.

[11] *Rules and Regulations of the National Labor Relations Board, Series 8, as amended*, Subpart H, Sec. 102.98, *et seq.* (24 Federal Register 9095, Nov. 7, 1959, as amended by 26 F. R. 3885, May 4, 1961, 26 F. R. 7546, Aug. 15, 1961, 27 F. R. 2091, Mar. 3, 1962, and 27 F. R. 5094, June 1, 1962.

Alabama Highway Express, supra, held that it could determine its own jurisdiction and declined to recognize the decision of the Board in *AO-29*. This being prior to the decision of this Court in *Curry*, the case was brought on for final hearing before appeal, at which time the petition for injunction was dismissed upon a State procedural technicality in that the partnership of Jemison and Conwell had become incorporated as Jemcon Broadcasting Co., Inc., since the filing of the application for injunction.

Picketing and solicitation of advertisers was resumed and a new *ex parte* restraining order was issued. At the interlocutory hearing it was agreed by the parties to the case that the dispute was a continuation of the previous dispute and was between parties at interest and parties in privity with those in the previous case. The trial court again held that the picketing and solicitation were unlawful under Alabama law and issued an interlocutory injunction, again declining to recognize the preemptive effect of the Board decision in *AO-29*. That case was appealed by the petitioner to the Supreme Court of Alabama prior to the appeal of respondent in the instant case and remains pending in that court at this writing.[12] (Alabama imposes no restriction upon its Supreme Court as to the length of time during which decisions may remain under consideration. The *Russell* case, *supra,* remained under consideration for over two years.) The temporary injunction, meanwhile, remains in effect, and petitioner's members have been effectively deprived of their Federal rights in excess of two years.

The second of those cases is the present case.

In the third case[13] the union petitioned for an election and the Director of the Board's Fifteenth Region, after hearing, asserted jurisdiction pursuant to applicable rules

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[12] *Radio and Television Technicians Local Union 1264, IBEW, AFL-CIO* v. *Jemcon Broadcasting Co., Inc.*, 1st Div. 143, in the Supreme Court of Alabama, argued and submitted for decision, November 14, 1963.

[13] *WGOK, Inc.* v. *IBEW Local 1264*, Case No. 61395-MeC in the Circuit Court of Mobile County, Alabama.

of decision previously issued by the Board.[14] WGOK was also one of a chain of radio stations. Review upon the issue of jurisdiction was denied following appeal to the Board. At the close of the representation hearing WGOK discharged two, of four, of its radio technicians and in its appeal to the Board contended that one of the remaining technicians was supervisory and that the Board's Regional Director had erred in ordering an election in a one man unit. The Board granted review on this issue.

Both discharged employees filed unfair labor practice charges and after the Board granted review on the unit issue, the petitioning union filed unfair labor practice charges. The Board's Regional Director asserted jurisdiction on behalf of the Board, consonant with his previous election order which had been based upon applicable rules of decision of the Board, and issued complaints upon all three unfair labor practice charges. The complaints were heard by a trial examiner and are pending decision at this writing.[15]

On September 15, 1963, the petitioning union, after first giving notice thereof to Station WGOK, called a strike at the station on account of its unfair labor practices. Peaceful picketing and solicitation of advertisers was commenced and a letter was written to the judges of the Circuit Court of Mobile County, advising them of the foregoing recitations of fact and requesting a hearing before any injunctions issued inasmuch as the Board had already assumed jurisdiction over the dispute. In November, 1963, WGOK filed a damage suit in the United States District Court for the Southern District of Alabama alleging that the labor dispute affected interstate commerce and claiming damages against the union for violation of Section 303 of the Taft-Hartley Act (29 USC 187).[16]

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[14] Case No. 15-RC-2729.

[15] 15-CA-2299-1, 15-CA-2299-2 and 15-CA-2357.

[16] *WGOK, Inc. v. IBEW Local Union 1264 and IBEW, AFL-CIO*, Civil Action No. 3198-63 in the United States District Court for the Southern District of Alabama.

In January, 1963, WGOK, Inc. filed a second suit, this time in the Circuit Court of Mobile County and alleging violations of Alabama law, and an *ex parte* injunction was issued notwithstanding the letter which had been mailed to the Circuit Judges of Mobile County.[17] That case was removed to the United States District Court but has been remanded to the state court for proceeding on the injunction application.[18]

Three separate unfair labor practice charges were filed with the Board as each of the aforementioned injunctions were procured by the three employers.[19] The charge against Radio Station WLIQ (Jemison and Conwell) was filed after the Board had ruled in *AO-29* that it would assert jurisdiction over the labor dispute. The charge against Radio Station WGOK was filed after the Regional Director had asserted jurisdiction and had issued his decision and direction of election. The charges alleged that in each case, in circumstances clearly indicating that the Board would assert jurisdiction over the dispute, the employer had wilfully procured injunctions for the purpose of interfering with employees' rights under Section 7 of the Act to engage in concerted activity. It was urged in support of each charge that the injunction interfered with the exercise of the Board's statutory jurisdiction and that the acts of each employer violated Section 8(a)(1) of the Act. Because of the decision of the Board in *Clyde Taylor Company*, 127 NLRB 103, in which it held that it would not find that the use of State court processes constitutes an unfair labor practice, the Regional Director declined to issue a complaint in each of the cases. Appeals to the General Counsel of the Board upon each such refusal was denied, so that

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[17] *WGOK* v. *IBEW Local Union 1264, et al*, Civil Action No. 3215-64 in the Circuit Court of Mobile County, Alabama.

[18] See in this connection *Morton* v. *Teamsters' Union* 320 F 2d 505 (CA-6, 1963), cert. granted, Dec. 9, 1963, now pending in this Court.

[19] *In re Jemcon Broadcasting Co., Inc.*, 15-CA-2279; *In re Broadcast Service of Mobile, Inc.*, 15-CA-2292; *In re WGOK, Inc.*, 15-CA-2415.

no recourse is available to petitioners in the Federal administrative procedure.

The State court injunctions which have been issued in these three cases, notwithstanding repeated claims of Federal preemption, have totally and continuously frustrated Federal labor relations policy and the Federally regulated rights of the members of the petitioning union since September, 1961. "Relinquishment of this exercise of State court jurisdiction is essential 'if the danger of state interference with national policy is to be averted.' "[20]

CONCLUSION

For each of the reasons above stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

J. R. Goldthwaite, Jr.
1431 Candler Building
Atlanta, Georgia 30303

Pierre Pelham
First National Bank Bldg. Annex
Mobile, Alabama

Counsel for Petitioners

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. ——

RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL,

Petitioners,

VS.

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

J. R. GOLDTHWAITE, JR.
1431 Candler Building
Atlanta, Georgia 30303

PIERRE PELHAM
First National Bank Bldg., Annex
Mobile, Alabama

Counsel for Petitioners.

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VS.

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

APPENDIX TO PETITION OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

APPENDIX A

PART A

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 8, Clauses (3) and (18):
Art. VI, Clause (2):

"Art. I, Sec. 8 (Power of Congress). The Congress shall have Power —

"(3). To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

• • • • • • • • • • •

"(18). To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

"Art. VI. Clause 2. Supreme Law.—

"(2). This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

NATIONAL LABOR RELATIONS ACT, ETC.

PART B

STATUTES INVOLVED

LABOR MANAGEMENT RELATIONS ACT, 1947,
and
NATIONAL LABOR RELATIONS ACT, AS AMENDED
61 Stat. 140 ff, 73 Stat. 541 ff, 29 U.S.C.

Section 157, Section 158 (b) and (c), Section 160 (a), (c), (k) and (l), Section 164:

"Sec. 157. • • •

"Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 158. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been

certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of an employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment,

as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity

for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in the paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

"Sec. 164. . . .

"(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

OPINION AND JUDGMENT OF ALABAMA SUPREME COURT

APPENDIX B

EXCERPTS FROM PLEA TO THE JURISDICTION

Filed September 10, 1962
(R. 7)

PLEA TO THE JURISDICTION

Come the Respondents . . . and show the Court the following facts:

1. Respondent Local 1264. . . . is a labor organization within the meaning of the National Labor Relations Act, as amended (29 USC, Sec. 151, *et seq*). . . .

• • • • • • • • • • •

4. One of the radio stations with which the Respondent had in effect a collective bargaining agreement was WAIP operating at Prichard, Alabama and broadcasting throughout the Mobile Area. The physical facilities of such station were purchased by Complainant and Complainant began operation on August 1, 1962. As is alleged in Complainant's Bill for Injunction, Complainant began broadcasting with a temporary employee whose hours of work, wages and conditions of services were substantially below those established as the standard in collective bargaining agreements in effect with Respondent Local 1264 and other radio stations in the Mobile Area.

5. Such operation of Complainant constituted unfair and disadvantageous competition with other radio stations in the Mobile area who operate under collective bargaining agreements and therefore threatens to undermine the wages, hours, conditions of employment and high working standards which have been attained by the members of Local 1264 through long years of diligent effort.

6. On account of such substandard conditions and unfair competition and in order to advise the public and persons

who might do business with Complainant by advertising on Station WSIM thereof, Respondent Union stationed two pickets at the premises of Complainant occupied by the studio of Radio Station WSIM on August 10, 1962, which two pickets walked back and forth carrying signs which advised that the station was operating under non-union conditions. Such picketing was also conducted on August 11 and on weekdays from August 13 through the present except on Labor Day. Such picketing is conducted two hours in the morning and two hours in the afternoon at normal times of shift change.

7. The members of Respondent Union have contacted persons and businesses advertising over Station WSIM and have advised such persons that Radio Station WSIM is being operated under substandard conditions without a collective bargaining agreement in effect and have requested such advertisers to patronize radio stations who adhere to Union standards rather than Radio Station WSIM. A list of advertisers contacted is attached hereto and made a part hereof as Exhibit 1.

8. Respondent further shows that such advertisers each purchase, directly and indirectly, goods which are shipped in interstate commerce and some of such advertisers ship goods in interstate commerce. The combined purchases and shipments of goods in interstate commerce of such advertisers annually far exceed $50,000 in value. Further, Delchamps is a retail grocery chain, the annual dollar volume of sales of which far exceeds $500,000.

9. The activities of Respondent which are complained of by the Complainant in its bill for injunction therefore substantially affect interstate commerce, and the National Labor Relations Board has exclusive jurisdiction over the provisions of the National Labor Relations Act, as amended, to afford any relief to Complainant to which it is entitled under the provisions of such law. Attached hereto and made a part hereof is a petition for an Advisory Opinion addressed to the National Labor Relations Board in the case

of Local Union 1264, IBEW and Jemcon Broadcasting Company, and also copy of the decision of the National Labor Relations Board rendered upon such petition holding, in a case substantially identical to the present, that it had jurisdiction over the dispute between respondent and the complainant, which decision is direct authority that the National Labor Relations Board has jurisdiction to adjudicate the allegations contained in Complainant's bill for injunction.

10. Complainant's radio broadcast business causes Complainant to be engaged in interstate commerce and Complainant is an instrumentality of commerce whose business affects interstate commerce within the meaning of the National Labor Relations Act and whose labor relations are subject to the exclusive jurisdiction of the National Labor Relations Board.

11. Respondents further show that their activities constitute concerted activity for their mutual aid and protection the right to engage in which is guaranteed and protected by the National Labor Relations Act (29 USC, Section 157).

. . . . . .

13. For this Court to assume jurisdiction to grant relief on Complainant's bill for injunction would be unconstitutional and invalid and in derogation of the authority granted to the Congress of the United States by Article I, Section 8, Paragraph 3 of the Constitution of the United States to regulate interstate commerce, and of Article VI, Paragraph 2, of the Constitution of the United States providing that the Constitution and laws of the United States are the supreme law of the law and anything in the Constitution or laws of any State to the contrary notwithstanding because pursuant to such power the Congress has assumed jurisdiction over the subject matter of the bill for injunction and has empowered the National Labor Relations Board to grant relief with respect thereto by enacting the National Labor Relations Act, as amended (29 USC, Section 151, et seq.).

OPINION AND JUDGMENT OF ALABAMA SUPREME COURT

APPENDIX B

EXCERPTS FROM AMENDMENT TO PLEA TO THE JURISDICTION

Filed September 12, 1962
(R. 81)

Respondents amend their Pleas to the Jurisdiction by adding a paragraph. . . .

4(a). The Complainant, Broadcast Service of Mobile, Inc., which operates Radio Station WSIM, is only one of a group of four radio stations known as Holt Broadcasting Service and the headquarters of said Holt Broadcasting Service is located in Hattiesburg, Mississippi. The other stations composing the Holt Broadcasting Service are WHHY, in Montgomery, Alabama; WHSY in Hattiesburg, Mississippi and WHNY in McComb, Mississippi. All four of these stations including WSIM at Prichard, Alabama, are licenses and regulated by the Federal Communications Commission; there exists common ownership over all four stations with one Charles W. Holt controlling the majority interest in all four stations; there is common management of all four stations with Charles W. Holt being the executive head of all four stations; there also exists a common personnel and labor relations policy for all four stations. Therefore the Complainant, Broadcast Service of Mobile, Inc., operator of Station WSIM, is an integral part of an integrated operation of four radio stations located in Alabama and Mississippi and known as Holt Broadcasting Service, and under the National Labor Relations Act, as amended, the volume of business done at each of the aforesaid four radio stations will be considered by the Board in asserting jurisdiction over the labor dispute which is the subject-matter of Complainant's bill of complaint, and the revenues received by Holt Broadcasting Service from the

operation of the aforesaid stations greatly exceed $100,000.00 per year.

• • • • • • • • • • •

MOTION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF

Filed December 20, 1963
Record 428-432

Comes the appellee and requests that the Court rehear and reconsider its decision issued December 12, 1963, in the within styled case and that upon such reconsideration the decision of this Court be vacated and a new decision and judgment be issued affirming the judgment of the Court below. For grounds of such motion appellee shows that the Court erred (1) in its analysis of the pleadings in the case, (2) in restricting its consideration to "the face of the pleadings" and in failing to consider the evidence before the Court below relative to the jurisdictional issue, (3) in failing to find that controlling decisions of the National Labor Relations Board applied to the facts in this case demonstrate that the Board would assert jurisdiction to adjudicate the subject matter of appelant's complaint, and (4) in failing to find that, in any event, under the pleadings and evidence in this record it is arguable that the National Labor Relations Board would assert jurisdiction over the controversy and in failing to yield to the "primary competence" of the Board in such circumstances.

On Page 6 of its decision the Court correctly states appellee's contentions that (1) controlling decisions of the National Labor Relations Board hold that business of the appellant affects interstate commerce to the extent that the Board would assert its exclusive authority to adjudicate the legalities and illegalities of the dispute and (2) that, in any event, this Court must yield to the jurisdiction of the Board when it is "arguable" that the Board would assert jurisdiction. The Court, however, restricts its consideration to the second of these contentions and seems to

overlook entirely the several Board decisions cited by appellee which are applicable to commonly owned and controlled financial enterprises.

In its decision the Court cites and relies exclusively upon the ruling of the Board in *Raritan Volley Broadcasting Co., Inc. and American Federation of Television and Radio Artists,* 122 NLRB #16, which is applicable to *single* radio stations, as distinguishable from *multiple-enterprise* chains of radio stations; and the Court holds that, because appellee did not rely and plead the single station standard in its plea to the jurisdiction, the Court will look no further.

In its plea to the jurisdiction appellee alleged (R. 9) that the activities of appellee complained of by appellant substantially affect interstate commerce and (R. 81) that the appellant is one of four commonly owned and controlled radio stations of the Holt Broadcasting Service, having a common labor relations policy, and that the revenues received by the entire financial enterprise of the Holt Broadcasting Service from the operation of the four station chain greatly exceed $100,000 per year. These allegations on the face of the pleadings assert facts which are born out in proof and which demonstrate that the National Labor Relations Board would assert jurisdiction over *this* controversy. The allegations of the plea to the jurisdiction therefore exclude every condition under which jurisdiction lawfully may be exercised by the Alabama Courts.

The evidence in the record which leads to the necessary conclusion that the four stations are a single financial enterprise in the consideration of the National Labor Relations Board are fully detailed in appellee's original brief. In cases such as the present the Board considers the substantiality of the effect upon interstate commerce of the entire financial enterprise rather than that of a single member of the chain.

Major Service Co., 129 NLRB 794;
Orkin Exterminating Co., 115 NLRB 622;
Crenshaws, Inc., 115 NLRB 1374;

Southeastern Concrete Products, 127 NLRB No. 118;
Alton Myers, 127 NLRB No. 138;
Central Dairy Products, 114 NLRB 1189;
Wash Well No. 2, Inc., 139 NLRB No. 37;
P-M Garages, Inc., 139 NLRB No. 84;
Sakrete of Northern California, Inc., 137 NLRB No. 131;
Perfect T-V, Inc., 134 NLRB 575;
Pine State Creamery Co., Inc., 130 NLRB 892;
Quality Coal Corp., 139 NLRB No. 6;
Corfu Mfg. Co., 48 LRRM 1584;
Hamilton Bros., Inc., 130 NLRB 233;
Alamo-Brown Beef Co., 128 NLRB 32;
Chicago Northside Newspapers, 124 NLRB 254;
Edward Small Productions, Inc., 127 NLRB 283;
Alpha Corp., 128 NLRB 309;
Checker Cab Co., 141 NLRB No. 64;
NLRB v. Sightseeing Guides Union, 310 F 2d 40.

Even if this Court did not undertake on this record to overrule *Alabama Highway Express, Inc. v. Teamster Local No. 612*, 268 Ala 392, 108 So 2d 350, consideration of the above cited Labor Board authorities and the application of those authorities to the pleadings and evidence in this case require affirmance under the rule annunciated in *Alabama Highway Express.*

MOTION FOR REHEARING

We therefore urge that for each of the reasons herein assigned the Court should reconsider its decision of December 12, and issue a new opinion and judgment affirming the judgment of the Court below.

1st Nat'l Bank Bldg.
Annex
Mobile, Alabama
1431 Candler Bldg.
Atlanta, Ga. 30303
Phone: 523-2525

Respectfully submitted,

PIERRE PELHAM
ADAIR, GOLDTHWAITE & STANFORD
/s/ By J. R. GOLDTHWAITE, JR.

CERTIFICATE OF SERVICE

This will certify that copy of the above and foregoing motion for rehearing has this day been served upon counsel for the appellant by mailing the same by first class United States mail.

This 19 day of December, 1963.

J. R. GOLDTHWAITE, JR.

APPENDIX C

PART A

OPINION OF THE TRIAL COURT

Entered September 13, 1962
(R. 83)

DECREE

This cause coming to be heard on the complainant's motion for a temporary injunction, upon the amended bill of complaint, affidavits submitted by the complainant and the respondent and Exhibit 1 of respondents' plea to the jurisdiction; and upon consideration thereof the Court finds that:

1. The picketing conducted by the respondent union and its agents is entirely peaceful and that there is no threat or apprehension of physical violence;

2. The complainant has five employees none of whom belong to or desire the respondent union to represent them;

3. The purpose of the respondent union's picketing, respondent union's letters addressed to "All Merchants of the Mobile-Pritchard Area" and personal contacts by representatives of respondent union with advertisers over complainant's Radio Station is to require complainant to recognize the respondent union as the bargaining agent of complainant's employees or to require the complainant to em-

ploy a member of the respondent union as a radio engineer at complainant's station located in Prichard, Alabama.

The Court further finds that each of the objectives of the picketing is contrary to the public policy of the State of Alabama as expressed in the Alabama Right to Work Law and the common law of the State of Alabama.

The Court further finds that the picketing, personal solicitation and solicitation by letter is causing irreparable damage to the complainant and the Court being of the opinion that the complainant's application for a temporary writ of injunction as prayed for in the amended bill of complaint should be granted.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that upon the complainant entering into a good and sufficient bond, conditioned as provided by law, in the sum of ONE THOUSAND AND NO/100ths ($1,000.00) DOLLARS, same to be approved by the Register of this Court, that the Register issue a temporary writ of injunction as prayed for in the amended bill in this cause.

DONE and ORDERED, this 13th day of September, 1962.

/s/ Joseph M. Hocklander
Circuit Judge in Equity Sitting

APPENDIX C

PART B

OPINION OF THE TRIAL COURT

Entered May 23, 1963

ORDER GRANTING MOTION TO DISSOLVE TEMPORARY INJUNCTION AND DISMISSING CAUSE

This cause being regularly set down for hearing and being submitted for decree on the pleadings and testimony as heard in open Court and the Court having duly con-

sidered the same is of the opinion that the motion to dissolve the temporary injunction should be granted on the grounds that the Court's jurisdiction was preempted by the National Labor Relations Act.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the motion to dissolve the temporary injunction heretofore issued in this cause be, and the same hereby is, granted, and said injunction be, and hereby is, dissolved.

It is further ORDERED and DECREED by the Court that the relief as prayed for in the Bill of Complaint as amended be, and hereby is, denied, and that the Complainant be, and hereby is, taxed with the costs of this cause, for which let execution issue.

Dated, May 23rd, 1963.

/s/ JOSEPH M. HOCKLANDER
Judge

APPENDIX C

PART C

OPINION OF THE SUPREME COURT OF ALABAMA

Entered December 12, 1963
R. 414 - 426)

SIMPSON, *Justice.*

This is an appeal from a final decree of the Circuit Court of Mobile County, Alabama, in Equity, dissolving a temporary injunction theretofore in effect and dismissing the cause on the ground that the court's jurisdiction was preempted by the National Labor Relations Act.

The action was commenced on September 4, 1962, by apppellant by verified bill of complaint, which, among other things, prayed for a temporary restraining order, enjoining Local 1264, International Brotherhood of Electrical Workers, et al., from interfering with the conduct of appellant's business.

Appellant on February 10, 1963, filed a verified amended complaint alleging that the appellant, prior to August 1, 1962, purchased certain assets of Radio Station WAIP, Prichard, Alabama, and commenced operation of the station with a full complement of personnel. Around August 3, 1962, appellee demanded that appellant employ David Fridge as radio engineer and demanded that appellant recognize appellee as the collective bargaining representative of appellant's employees although none of the employees of appellant had designated the appellee as his collective bargaining representative. Appellant refused to terminate any of its employees in order to employ Fridge. On August 10, 1962, appellee began picketing appellant's office in Prichard, Alabama; none of the person who picketed appellant had ever been employees of appellant. Appellee "since August 10, 1962, has by picketing, letters addressed to persons, firms and corporations and by personal contact sought to effect a boycott of complainant and to cause persons doing business with complainant to refrain from doing business with complainant." Since August 10, 1962, appellee by letter and personal contact induced customers of appellant to cancel advertising agreements with appellant. The object of the picketing and boycotting was to force and require appellant to bargain with appellee although appellee had not been selected by any of appellant's employees for the purpose of collective bargaining; to force appellant to violate the Alabama Right to Work Act; to force appellant's employees to join the appellee; to force appellant to employ members of the appellee; to ruin the business of appellant and to require persons advertising over appellant's radio station to breach their advertising contracts with appellant. The complaint alleges that irreparable damage would be caused to appellant unless the picketing and related conduct is enjoined.

Appellee filed a plea in abatement to the jurisdiction of the court on the ground that the National Labor Relations Board had exclusive jurisdiction over the matters alleged in the complaint. The plea to the jurisdiction admitted that

the appellee had by letter and by personal contact requested advertisers in Mobile, Alabama, to advertise over radio stations other than WBIM. After a hearing in open court on September 13, 1962, the trial court issued a temporary injunction upon the amended bill of complaint and affidavits submitted by the appellant and appellee. In its temporary injuction the court found:

> "1. The picketing conducted by the respondent union and its agents is entirely peaceful and that there is no threat or apprehension of physical violence;
>
> "2. The complainant has five employees none of whom belong to or desire the respondent union to represent them;
>
> "3. The purpose of the respondent union's picketing, respondent union's letters addressed to 'All Merchants of the Mobile-Prichard Area' and personal contacts by representatives of the respondent union with advertisers over complainant's Radio Station is to require complainant to recognize the respondent union as the bargaining agent of complainant's employees or to require the complainant to employ a member of the respondent union as a radio engineer at complainant's station located in Prichard, Alabama.
>
> "The Court further finds that each of the objectives of the picketing is contrary to the public policy of the State of Alabama as expressed in the Alabama Right to Work Law and the common law of the State of Alabama.
>
> "The Court further finds that the picketing, personal solicitation and solicitation by letter is causing irreparable damage to the complainant and the Court being of the opinion that the complainant's application for a temporary writ of injunction as prayed for in the amended bill of complaint should be granted."

In its answer to the amended complaint the appellee admitted that respondent since August 10, 1962, had by picketing, letters addressed to persons, firms and corporations and by personal contact sought to effect a boycott of complainant and to cause persons doing business with or desiring to do business with complainant to cease doing busi-

ness with complainant or to refrain from doing business with complainant.

Appellee's answer further admitted that appellee by personal contact and by mail contacted advertiser of WSIM for the purpose of inducing them to cease advertising over radio station WSIM but sought to justify the action on the ground that it was protected in its activity under the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States.

On May 23, 1963, after hearing in open court, the court entered an order dissolving the temporary injunction and dismissing the cause on the ground that jurisdiction of the Circuit Court of Mobile County, Alabama, was pre-empted by the National Labor Relations Act. This appeal followed.

While there are several assignments of error, only one question is presented: Did the Circuit Court err in determining that it did not have jurisdiction of the subject matter?

Appellee argues that all of the acts and conduct alleged in the complaint are subject matter regulated by the National Labor Relations Act, as amended, and as to which the National Labor Relations Board has exclusive authority to adjudicate legalities and illegalities if the dispute affects interstate commerce. It is further argued that state courts are without authority to adjudicate the merits of a labor dispute as to which it is arguable that the Labor Relations Board would assert jurisdiction and that each case must be first submitted to that Board to determine in the first instance whether it will assert jurisdiction.

Appellant, on the other hand, argues that the entire field of labor relations has not been pre-empted by federal legislation; that there remains a substantial area in which the states may act, and that in fact the activity complained of here has been expressly left to the states by Congress through the enactment of an amendment to the Labor Management Relations Act of 1947, as amended in 1959 (29 U.S. Code Ann., §164, [c] [1] and [2]), providing:

Section 164 (c) (1):

"The Board, in its discretion, *may, by rule of decision* or by published rules adopted pursuant to the Administrative Procedure Act, *decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction;* Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

[Emphasis supplied.]

Section 164 (c) (2):

"Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection to assert jurisdiction."

We are constrained to agree with appellant. It seems to us that the National Labor Relations Board has, in the words of the above amendment, "declined to assert jurisdiction over any labor dispute involving" the class or category of employers to which appellant belongs, thus leaving such disputes within the jurisdiction of the state court. In support of this belief, we quote the following language from *Raritan Valley Broadcasting Co., Inc.* v. *American Federation of Television & Radio Artists, New York Local (AFL-CIO)*, 122 NLRB, No. 16, Case no. 22-RC-190, which opinion was rendered by the National Labor Relations Board after a hearing before the full Board on November 14, 1958:

"Ever since the enactment of the National Labor Relations Act in 1935, the Board has consistently held to the position that it better effectuates the policies of the Act and promotes the prompt handling of cases not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress. For the first 15 years the Board exercised its

discretion in this area on a case-by-case basis. In 1950 the Board first adopted certain jurisdictional standards designed to aid it in determining where to draw the dividing line between exercised and unexercised jurisdiction. In 1954 the Board re-examined its jurisdictional policies in the light of its experience under the 1950 standards and revised its jurisdictional standards. At that time the Board noted that 'further changes in circumstances may again require future alterations of our determinations one way or anothers'. Consistent with this practice of periodic review of its jurisdictional policies and a direct consequence of the Supreme Court's decision in P. S. Guss, d/b/a Photo Sound Products v. Utah Labor Relations denying to the States authority to assort jurisdiction over enterprises as to which the Board declines to exercise its statutory jurisdiction, the Board re-examined its existing jurisdictional policies and the standards through which such policies were implemented. As a result the Board determined to revise its jurisdictional policies at this time so that more individuals, labor organizations and employers may invoke the rights and protection afforded by the statute. In Siemens Mailing Service the Board fully set forth the general considerations which persuaded it that this could best be accomplished by the utilization of revised jurisdictional standards as an administrative aid in making its jurisdictional determinations. The Board has chosen this case to set forth the revised standard to be applied to enterprises operating communication systems.

"The Board has decided that it will better effectuate the policies of the Act to assert jurisdiction in all future and pending cases involving enterprises engaged in the operation of radio or television broadcasting stations or telephone or telegraph systems which do a gross volume of business of at least $100,000 per annum.

"In adopting this standard the Board has given due consideration to all relevant budgetary factors bearing on its capability to handle an increased caseload, and to comments and briefs of interested parties received in response to its invitation contained in the Board's July 22, 1958, press announcement of its proposed changes in jurisdictional policies. It is the Board's opinion in the light of its current budgetary limitations

> and the volume of cases which may be expected under its other standards, the $100,000 gross volume of business standard will extend the Board's jurisdiction over communications systems to the maximum possible extent at this time and will reasonably ensure that the Board will assert jurisdiction over all labor disputes involving such enterprises which tend to exert a pronounced impact on commerce."

The record clearly shows, and it is apparently undisputed, that appellant's gross volume of business per annum is considerably below the $100,000 standard established by the Board. Congress saw fit to amend the Labor Management Relations Act as set forth above following the pronouncement of the Supreme Court of the United States in the *Guss* case, supra.

Appellee argues that affiliated enterprises of the majority and controlling stockholders of appellant should be considered by the Board for determining whether the jurisdictional standards are met and insists that the court must base its jurisdiction on a consideration of what the Board would do under the facts of this case, and that in any event the case must first be submitted to that body. We cannot agree. We have recently stated that:

> "• • • the authority is clear to the effect that every court of general jurisdiction has judicial power to determine the question of its own jurisdiction."—See *Alabama Express, Inc. v. Local 612, etc.*, 268 Ala. 392, 397, 108 So. 2d 350, and cases there cited.

It is equally clear that the law of this state is settled to the effect that every reasonable intendment, not contradicted by the face of the pleadings, will be made in favor of the jurisdiction of the Circuit Court and plea to the jurisdiction of the Circuit Court must allege facts which exclude every condition under which jurisdiction may be lawfully exercised. *Atlantic Coast Line R. Co. v. Ballard* 202 Ala. 354, 80 So. 436. Here the appellee's plea failed to allege that the appellant's gross business exceeded $100,000 per annum which, if proven, would exclude the court's jurisdiction under § 164(c)(1), Labor Management Relations Act

of 1947, as amended, supra. On this basis we believe the learned trial court erred in dismissing the temporary injunction on the ground that the court's jurisdiction was pre-empted.

Appellee argues that *Alabama Highway Express, Inc. v. Local 612*, etc., supra, must be overruled in light of the pronouncement of the Supreme Court of the United States in *Construction and General Laborers Union v. Curry*, 371 U.S. 544.

Inasmuch as we believe that the jurisdiction of the Circuit Court in this case is preserved by § 164(c)(1), Labor Management Relations Act. supra, and by the express declination of the National Labor Relations Board to assert its jurisdiction in cases involving small radio stations, of which appellant is concededly one, we can see no need at this time to determine whether the court's jurisdiction would have been pre-empted had the appellant sought the court's jurisdiction only on the basis of facts claimed to have been in violation of this state's Right To Work Law.

It should be made very clear that we have made no attempt to decide the merits of this case, but simply hold that the trial court erred in its determination under the undisputed facts that it had no jurisdiction over the subject matter involved.

REVERSED AND REMANDED, WITH DIRECTIONS THAT THE TEMPORARY RESTRAINING ORDER BE REINSTATED.

Livingston, C. J., Merrill and Hazwood, J. J., concur.

APPENDIX C

PART D

Judgment Entered Thursday, December 12, 1963
(R. 427)

THE SUPREME COURT OF ALABAMA—THURSDAY, DECEMBER 12, 1963

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: ALL THE JUSTICES
1st Div. 163.

BROADCAST SERVICE OF MOBILE, INC.

vs.

LOCAL 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.

MOBILE CIRCUIT COURT, IN EQUITY

Come the parties by attorneys and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the appellees, Local 1264, International Brotherhood of Electrical Workers and William Rayburn, David Fridge and H. D. Smith, pay the costs accrueing on said appeal in this Court and in the Court below, for which costs let execution issue.

APENDIX C

PART E

ORDER ON MOTION FOR REHEARING

Entered Thursday, January 16, 1964.
(R. 433)

THE SUPREME COURT OF ALABAMA—THURSDAY, JANUARY 16, 1964

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: ALL THE JUSTICES
1st Div. 163

BROADCAST SERVICE OF MOBILE, INC.

vs.

LOCAL 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.

MOBILE CIRCUIT COURT, IN EQUITY

It Is Ordered that the application for rehearing filed on December 20, 1963, be and the same is hereby overruled.

No Opinion Written on Rehearing.